

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF MISSISSIPPI  
EASTERN DIVISION

JACQUES WEISS, MARILYN F. WEISS,  
CHARI KOSCOVE, f/k/a  
CHARI W. ORENSTEIN, JEFFERY K. WEISS,  
J. BRUCE WEISS and DAVID IAN WEISS

PLAINTIFFS

vs.

CAUSE NO. 1:93CV164-D-D

HENRY M. FISCHER and  
LONA F. COHEN, f/k/a LONA F. FREEDMAN

DEFENDANTS

LONA F. COHEN, f/k/a LONA F. FREEDMAN

CROSS-PLAINTIFF

vs.

HENRY M. FISCHER

CROSS-DEFENDANT

MEMORANDUM OPINION

This matter is before the undersigned on the motion of the cross-defendant Henry M. Fischer to dismiss the claims of the cross-plaintiff Lona F. Cohen for failure to state a claim upon which relief can be granted. Both the cross-plaintiff and cross-defendant in this action have been sued for their purported liability on personal guaranty agreements<sup>1</sup>. The cross-plaintiff seeks recovery against the cross-defendant on theories of fraudulent and negligent misrepresentation, as well as duties owed by the cross-defendant based on his status of an officer and director of a corporation. Finding that the cross-defendant has

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<sup>1</sup> Summary judgment has already been entered by this court in favor of the plaintiff as to claims asserted against the defendant/cross-defendant Henry Fischer.

failed to state claims upon which relief can be granted, the cross-defendant's motion to dismiss is granted<sup>2</sup>.

### I. FACTUAL BACKGROUND

The Lawrin Company, a Mississippi corporation, engaged in the manufacture of lamps. As of 1980, both cross-defendant Fischer and cross-plaintiff Cohen were substantial shareholders of the corporation. During 1980, the Lawrin corporation negotiated a repurchase of stock from several stockholders, namely the plaintiffs in this action. Pursuant to this repurchase of stock, several documents were negotiated and signed. For purposes of clarity, these documents are now discussed individually.

#### A. THE "REDEMPTION AGREEMENT"

The redemption agreement was purportedly signed by the plaintiffs and the Lawrin corporation<sup>3</sup> on March 17, 1980. By its terms however, it was to be retroactively effective beginning on February 1, 1980. This document provided in part for the repurchase of 55 shares of preferred stock and 403 1/3 shares of

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<sup>2</sup> The court does note the striking similarity, if not identical nature, of the cross-plaintiff's claims with her asserted defenses to the plaintiffs' claims against her. The court is curious as to how some of the cross-plaintiff's claims, if successful, would benefit the cross-plaintiff in any greater manner than a successful assertion of the same claims as a defense to the plaintiffs' claims. At this time, this court expresses no opinion as to the merit of these defenses.

<sup>3</sup> Defendant Henry Fischer signed the Redemption Agreement as well, in his capacity as president of the corporation. Lona Cohen did not sign this document.

common stock then owned by the plaintiffs. The selling price for these shares was \$910,000.00. A portion of the price was to be paid in cash upon the closing of the transaction, and the balance of \$775,000.00 was to be paid in fifteen (15) annual installments, the first payment due on February 1, 1981. The financing of this arrangement was evidenced by six (6) promissory notes signed by the corporation, at an interest rate of nine percent (9.00%).

B. THE PROMISSORY NOTES

Six promissory notes, one payable to each of the plaintiffs for the amounts respectively owed them, were signed by Henry Fischer on behalf of the corporation. All of the notes were dated February 1, 1980. In each of the six promissory notes, the corporation waived presentment of payment, notice of dishonor, and protest. Further, each of the promissory notes contained the following paragraph:

If default is made for more than thirty (30) days in the payment of any installment specified herein, or any part thereof, then the holder hereof may, at its option, declare the whole sum then remaining unpaid immediately due and payable. In case of such default, the undersigned [Lawrin Company, by Henry Fischer] agrees to pay all costs of collection, including a reasonable attorney's fee, whether or not suit is instituted.

C. THE "AGREEMENT"

Another document involved in this case was the Agreement, dated January 19, 1980. This document was purportedly signed by

several parties, including both of the current defendants<sup>4</sup> and the plaintiffs Jacques and Marilyn Weiss. The Agreement provided several transactions<sup>5</sup>. First, the document contains the same agreement reached under the Redemption Agreement and its terms are identical with regard for the financing of the repurchase of stock from the plaintiffs by the corporation. Further, it provided for an assignment by the Lawrin Company of life insurance policies on the life of Jacques Weiss. Specifically, there was an assignment of a \$100,000.00 policy to Jacques Weiss.

Paragraph six of the Agreement provided:

Henry M. Fischer, Jack Freedman and wife, Lona Freedman, shall personally guarantee all obligations of the Lawrin Company to Jacques L. Weiss, Marilyn F. Weiss, their children, and the trust for their children, including the purchase of the stock and for the compensation arrangement.

D. THE "CONTINUING GUARANTY"

This document was dated March 17, 1980, and purportedly signed by both of the defendants. Its relevant paragraphs provide:

1. We, Henry M. Fischer, Jack Freedman, and Lona F. Freedman (hereafter called "Guarantors") do hereby jointly and severally personally guarantee the prompt payment and performance of all the obligations and liabilities of the Company to Sellers (being Marilyn F. Weiss, Jacques L. Weiss, Chari W. Orenstein, Jeffery K. Weiss, Jay Bruce Weiss [sic] [and David Ian Weiss] under the Redemption Agreement of March 17, 1980 and the Promissory Notes dated February 1, 1980.

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<sup>4</sup> Defendant Henry Fischer signed both on behalf of the Lawrin Company and for himself personally.

<sup>5</sup> Although not relevant to the case at hand, the "Agreement" provided for a non-competition covenant regarding Jacques Weiss, limited payment of his salary, and other such provisions.

. . . . .  
5. Each Guarantor hereby waives all notice, including notice of such indebtedness and demand, or notice of demand and nonpayment, and of notice of any act to establish any liability of any party on any promissory note, indebtedness, or obligation covered by this continuing guaranty.

E. THE "COMPENSATION AGREEMENT"

Yet another document in this litany of paper is the Compensation Agreement, executed on March 17, 1980<sup>6</sup>. This document was signed by Henry Fischer on behalf of the Lawrin Company, and by Jacques Weiss. The provisions of this agreement which are pertinent to the present action include an assignment of a life insurance policy on Weiss:

(d) The Company assigns and transfers to Weiss that certain split-dollar life insurance policy on the life of Weiss written by State Mutual of America Life Insurance Company, being Policy No. 1244817, provided that such policy shall be irrevocably endorsed so that The Company shall be irrevocably named as the first beneficiary of death benefits under the policy for \$27,213.30, and the owner of the cash value to the amount of \$27,213.30 if the policy is cancelled. Such policy shall also be irrevocably endorsed to provide that neither The Company nor Weiss shall have the right to borrow against such policy or its cash value. Weiss or his designee shall be the owner of such policy and shall have the sole right to designate the beneficiaries of death benefits after payment of The Company's death benefits. If Weiss wishes to continue such coverage, he shall pay all future premiums on such policy.

F. THE MODIFICATION LETTER

The Compensation Agreement was presumably modified, as evidenced by a letter dated April 21, 1980. The letter was

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<sup>6</sup> However, the document states that this agreement will also be retroactively in force from February 1, 1980.

addressed to Jacques Weiss and signed by him, but there does not appear to be a signature by anyone on behalf of the Lawrin Company. Regardless, the letter purports to modify the Compensation Agreement of March 17 in part by providing that Lawrin could borrow funds against its interest in the cash value of the life insurance policy on Weiss written by State Mutual of America Life Insurance Company. Likewise, Weiss would be permitted to borrow against the cash value of the policy to the extent that he had increased its value by virtue of subsequent payments since the assignment occurred.

Since the execution of all of these documents, payments were made on all of the obligations. However, several of the annual payments to the plaintiffs under the promissory notes were untimely. On December 1, 1992 the Lawrin Company filed a voluntary petition for relief pursuant to Chapter 11, Title 11 of the United States Code in the United States Bankruptcy Court for the Northern District of Mississippi. No further payments on any of the above obligations have been made since the corporation filed for relief in bankruptcy. The plaintiffs brought this action and seek to recover the debts allegedly owed them on the personal guaranty obligations of the defendants. The cross-plaintiff filed her claim to recover from the cross-defendant for damages based on both negligent and fraudulent misrepresentation, breach of fiduciary duty, and breach of the duty of good faith and fair dealing.

## II. DISCUSSION

The cross-plaintiff contends that her cross-complaint adequately asserts four separate causes of action against the cross-defendant. After a discussion of the relevant standards to be applied, the court will address these claims separately.

### A. STANDARD FOR A 12(B)(6) MOTION TO DISMISS

A Rule 12(b)(6) motion is disfavored, and it is rarely granted. Clark v. Amoco Production Company, 794 F.2d 967, 970 (5th Cir. 1986); Sosa v. Coleman, 646 F.2d 991, 993 (5th Cir. 1981). Dismissal is never warranted because the court believes the plaintiff is unlikely to prevail on the merits. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). Dismissal is appropriate only when the court accepts as true all well-pled allegations of fact and, "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Thomas v. Smith, 897 F.2d 154, 156 (5th Cir. 1989), quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 100-02, 2 L.Ed.2d 80 (1957); see Mahone v. Addicks Utility District, 836 F.2d 921, 926 (5th Cir. 1988); McLean v. International Harvester, 817 F.2d 1214, 1217 n.3 (5th Cir. 1987); Jones v. United States, 729 F.2d 326, 330 (5th Cir. 1984).

When making a determination under 12(b)(6), the court must look solely at the legal sufficiency of the pleadings. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90, 96

(1974); In re Catfish Antitrust Litigation, 826 F.Supp. 1019, 1025 (N.D. Miss. 1993). The court is confined to the pleadings, and "may only look within the four corners of the complaint in evaluating a Rule 12(b)(6) motion<sup>7</sup>." In re Catfish, 826 F.Supp. at 1025 (citing Goldman v. Belden, 754 F.2d 1059, 1065 (2d Cir. 1985)).

Normally, the complaint must only contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); Tuchman v. DSC Communications Corp., 14 F.3d 1061, 1067 (5th Cir. 1994). "In other words, a plaintiff must simply allege all of the elements of a right to recover against a defendant." Tuchman, 14 F.3d at 1067. However, if a claim of fraud is asserted, a higher standard of pleading must be met under Rule 9(b) of the Federal Rules of Civil Procedure, which states that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Buford v. Howe, 10 F.3d 1184, 1189 (5th Cir. 1994); Shushany v. Allwaste, Inc., 992 F.3d 517, 521 (5th Cir. 1993). The Fifth Circuit has never articulated the precise standards for particularity, determining that the requirements of Rule 9(b) necessarily differ with the facts of each case. Tuchman,

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<sup>7</sup> The cross-plaintiff apparently misunderstood the nature of the cross-defendant's motion to dismiss. The cross-plaintiff's response to the motion relies entirely upon affidavits and other documents, all of which the court cannot consider in ruling upon this motion. This court may only look to the face of the complaint to determine its legal sufficiency.

14 F.3d at 1067. However, "[a]t a minimum, Rule 9(b) requires allegations of time, place, and contents of the false representations, as well as the identity of the person making the representation and what he obtained thereby." Tuchman, 14 F.3d at 1068; Buford, 10 F.3d at 1188; Shushany, 992 F.2d at 521.

#### B. CROSS-PLAINTIFF'S FRAUDULENT MISREPRESENTATION CLAIM

With the heightened pleading requirements of Rule 8 in mind, the court now addresses the fraud-based allegations of the cross-plaintiff's complaint. The court must first look to see if the minimum requirements of a pleading for fraud have been met. While the complaint does note that Henry Fischer is the person that made the alleged allegations, this is the only requirement that is met with particularity. The complaint on its face fails to aver particular facts as to the time of the misrepresentations, fails to give anything other than generalities concerning the contents of the representations or where they were made, and is completely deficient as to what the cross-defendant gained by these representations. Even had the cross-plaintiff met these lax requirements, she still fails to generally allege all of the elements required in order to establish a claim of fraud under state law. Mississippi law requires the following elements to be proven in order to establish a claim or defense of fraud:

- (1) a representation;
- (2) falsity of the representation;
- (3) materiality of the representation;
- (4) the speaker's knowledge of the falsity or ignorance

of its truth;

- (5) the intent that the representation be acted upon by a person in a manner reasonably contemplated;
- (6) the hearer's ignorance of falsity;
- (7) reliance upon truth;
- (8) the hearer's right to rely thereon; and
- (9) consequent and proximate injury.

Whittington v. Whittington, 535 So.2d 573, 585 (Miss. 1988); Martin v. Winfield, 455 So.2d 762, 764 (Miss. 1984); Franklin v. Lovitt Equipment Co., Inc., 420 So.2d 1370, 1373 (Miss. 1982). Fraud will not be presumed. Babham v. Babham, 483 So.2d 341, 342 (Miss. 1986). All of the elements of fraud must be shown by clear and convincing evidence. Bryan v. Holtzer, 589 So.2d 648, 659 (Miss. 1991); Smith v. Smith, 574 So.2d 644, 650 (Miss. 1990); Sullivan v. Heal, 571 So.2d 278, 280 (Miss. 1990). However, a promise of future conduct will not meet the requirements of a representation unless the promise is made with the present intent not to perform. Bank of Shaw v. Posey, 573 So.2d 1355, 1360 (Miss. 1990). The face of the complaint merely avers a representation, reliance, and damages. The cross-plaintiff's claim for fraud is legally insufficient to support a recovery, and should be dismissed.

#### C. CROSS-PLAINTIFF'S NEGLIGENT MISREPRESENTATION CLAIM

The more stringent requirements of Rule 8 do not bind the cross-plaintiff in her asserted claim based on a negligent misrepresentation. However, the court must still look to see if the required elements for recovery have been plead in general terms. The first element of a negligent misrepresentation claim

is that the defendant has misrepresented a fact or omitted to represent a fact. Bank of Shaw v. Posey, 573 So.2d 1355, 1360 (Miss. 1990); White v. Hancock Bank, 477 So.2d 265, 270 (Miss. 1985). However, as a matter of law, representation as to promise of future conduct will never support recovery under a theory of negligent misrepresentation. Bank of Shaw, 573 So.2d at 1360. Privity is not required for a claim of negligent misrepresentation, but foreseeability and detrimental reliance are required. Hosford v. McKissak, 589 So.2d 108, 111 (Miss. 1991). The requirements for the tort of negligent misrepresentation must be shown by the preponderance of the evidence and are:

- 1) a misrepresentation or omission of a material fact,
- 2) that the representation or omission is material or significant,
- 3) that the person charged with the negligence failed to exercise that degree of diligence and expertise the public is entitled to expect of such persons,
- 4) that the plaintiff reasonably relied upon the representation or omission, and,
- 5) that the plaintiff suffered damages as a direct and proximate result of such reasonable reliance.

Bank of Shaw, 573 So.2d at 1360; Berkline Corp. v. Bank of Mississippi, 453 So.2d 699, 702 (Miss. 1984). Damage awards for negligent misrepresentation are based upon a lack of care, as opposed to the basis for damages in an action for fraud - the want of honesty. Bank of Shaw, 573 So.2d at 1360 (citing with approval First Money, Inc. v. Frisby, 369 So.2d 746, 750 (Miss. 1979)). Although only general averments were all that was required of the cross-plaintiff for this claim, she also fails to sufficiently

allege the requirements constituting a claim for negligent misrepresentation separate from the other claims which were pled. Dismissal of this claim is also appropriate.

#### D. CROSS-PLAINTIFF'S CLAIMS FOR BREACH OF DUTY

The cross-plaintiff asserts that the cross-defendant has breached his duties to her as the officer of the Lawrin Corporation. Particularly, the complaint states that Fischer breached his duties of reasonable care and diligence, good faith and fair dealing, and of a fiduciary duty. As an officer of a corporation, Fischer does owe such duties under Mississippi law. See Derouen v. Murray, 604 So. 2d 1086, 1092 (Miss. 1992); Omnibank of Mantee v. United Southern Bank, 607 So. 2d 76, 84 (Miss. 1992); Miss. Code Ann. § 79-4-8.42 (1989). Since the Lawrin Company also appears to be a close corporation, Fischer may also owe a heightened fiduciary duty to Cohen. See Fought v. Morris, 543 So.2d 167, 169-70 (Miss. 1989).

Normally, wrongs that affect the corporation, or the stockholders generally, give rise to a cause of action on behalf of the corporation and not of the individual stockholder. 19 Am. Jur. 2d Corporations § 2246 (1986). The cross-defendant correctly brings to the court's attention that under Mississippi law, an individual shareholder cannot assert claims belonging to the corporation. Jordan v. U.S. Fidelity and Guar. Co., 843 F.Supp. 164, 175 (S.D. Miss. 1993); Steven R. Ward, Inc. v. U.S. Fidelity

and Guar. Co., 681 F.Supp. 389, 394 (S.D. Miss. 1988); Bruno v. Southeastern Servs., Inc., 385 So.2d 620, 621 (Miss. 1980). A stockholder may not bring an individual cause of action for an injury suffered by the corporation, "even though the injury may result in the destruction or depreciation of the value of the plaintiff's corporate stock." Pennsylvania House Division of General Mills v. McCuen, 621 F.Supp. 1155, 1155 (S.D. Miss. 1985) (citing Stevens v. Louder, 643 F.2d 1078 (5th Cir. 1981)). The only recognized exception to the rule is when the stockholder shows a violation of a duty owed directly to him as opposed to the corporation. Jordan, 843 F.Supp. at 175. This exception only arises when "the wrong itself amounts to a breach of the duty owed to the stockholder personally," and has no application merely "because the acts complained of resulted in damage both to the corporation and to the stockholder." Id.

In the present case, the cross-plaintiff has alleged that the cross-defendant's breaches of duty resulted in a diminishment of her corporate stock and resulted in the corporation's subsequent filing for bankruptcy relief. The duties owed by the cross-defendant run to both the corporation and to its shareholders, and breaches of these duties are an injury to the corporation. The cross-plaintiff has not offered to explain, and this court fails to see, how this injury is any different than the injury suffered by the corporation by these alleged breaches. Any suit for breach of

Fischer's duties as an officer would have to be brought in the corporation's name as a derivative action, and would have to meet the procedural requirements of a derivative action. See, e.g., Miss. Code Ann. § 79-4-7.40; Fed. R. Civ. P. 23.1. In that those requirements are lacking in this case, those claims of the cross-plaintiff are properly dismissed.

### III. CONCLUSION

The cross-plaintiff has failed to properly plead her claims in this matter. The basic requirements of the Federal Rules of Civil Procedure have not been met in this case, and therefore, dismissal of the cross-plaintiff's claims are proper.

A separate order in accordance with this opinion shall issue this day.

This, the \_\_\_\_\_ day of September, 1994.

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United States District Judge

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CROSS DEFENDANT

ORDER GRANTING CROSS-DEFENDANT'S MOTION  
TO DISMISS CROSS-CLAIM

The undersigned, after reviewing cross-defendant's motion, cross-plaintiff's opposition thereto, the accompanying memoranda and other material supporting and opposing summarial disposition, is of the opinion that the cross-plaintiff has failed to state claims upon which relief may be granted, and that dismissal of the cross-claims is proper. Accordingly, pursuant to a memorandum opinion issued this day, it is hereby ORDERED that:

1) Cross-defendant's motion to dismiss cross-claim for failure to state a claim upon which relief can be granted is **GRANTED.**

All memoranda, depositions, affidavits and other matters

considered by this court in granting this motion to dismiss are hereby incorporated by reference and made a part of the record in this cause.

**SO ORDERED** this \_\_\_\_ day of September, 1994.

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United States District Judge